TABLE OF CASES

TEXT BOOKS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1043

UNION TRUST COMPANY, a corporation, as trustee under Paragraph Nineteenth of the will of Ann Porter, deceased,

Petitioner,

vs.

BERTHA PAULINE GENAU, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF FOR PETITIONER UNION TRUST COMPANY, AS TRUSTEE.

The petitioner herein, Union Trust Company, as trustee, submits this reply to the brief filed by counsel for the respondents Porter, Bradford, and McMeekin.

I.

The respondents contend that the Union Trust Company had no right to bring or maintain this suit because it is merely "a prospective or potential trustee." This argument is based upon a succession of fallacies.

Respondents' position is that the Union Trust Company is not a trustee under the will of Ann Porter until part or all of the property devised and bequeathed to it under the will has actually been distributed to it.

Such a contention is contrary to the fundamentals of the law of trusts. A testamentary trustee becomes such upon the death of the testator. His duties then begin. His first duty is "to take reasonable steps to take and keep control of the trust property." American Law Institute Restatement of the Law of Trusts, Section 175; Scott on Trusts, Volume 2, Section 175. Testamentary trustees must "bear in mind that the law knows no such person as a passive trustee, and that they cannot sleep upon their trust." Perry on Trusts and Trustees, Volume I, Section 266. In accordance with these principles, it is well settled that a testamentary trustee "will be liable to the cestuis if he allows the executor to retain possession longer than is required for the closing up of the estate, and a loss results." Bogert on Trusts and Trustees, Volume 3, Section 583. See also 32 A.L.R. 931, note, and 65 C.J. 685, Section 551.

In spite of these authorities, the respondents, on page 2 of their brief, contend that the Union Trust Company is not yet a trustee because "peradventure the property might be consumed in due course of administration and never reach the potential trustee." Under the respondents' view of the law a testamentary trustee must supinely await the distribution to him by the executor of the trust property. If, in the meantime, the executor wastes the assets of the estate or unduly prolongs its administration, that, according to the respondents, is a matter of indiffer-

ence to the trustee, for he is merely "a prospective or potential trustee" and has no rights or duties unless the executor chooses to distribute the trust property to him. The respondents' contention is obviously without merit.

In accordance with the rule that a testamentary trustee has very definite rights and duties immediately upon the testator's death and the probate of the will, the Union Trust Company brought this suit. Ann Porter died on December 21, 1940. Her will was admitted to probate on January 2, 1941. This suit was filed on April 17, 1944. (43) It is apparent that a reasonable time was allowed to elapse between the probate of the will and the filing of the suit.

As explained on page 17 of petitioner's brief in support of its petition for certiorari herein, one reason for filing the suit was because two prior decisions of the Supreme Court of Florida (Pelton v. First Trust & Savings Bank, 98 Fla. 748, 124 So. 169 and Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328) construing trust provisions for the perpetual addition of income to the principal of a charitable trust were hopelessly irreconcilable. The Union Trust Company desired a clear determination of the effect of the accumulation provision in the trust which it was to administer. If any part of the trust failed because of this provision, the Union Trust Company did not desire to take possession of or distribute property which was not lawfully a part of the trust.

Another reason for filing this suit was because the executor was using the income from the trust property to pay the decendent's debts and the expenses of administering her estate. The Union Trust Company contended

that this income could be used for such purposes only after the residuary estate and general legacies were exhausted. (50-51, 53-54, 392-393) It is obvious that this misuse of trust income could only be prevented by raising the question prior to the distribution of the estate by the executor. Otherwise the residuary and general legatees, whose legacies should have been used for these purposes, might have received and disposed of the assets bequeathed to them and the trustee's right of reimbursement would have been worthless.

Clearly, a testamentary trustee has not only the right but the duty to maintain appropriate legal actions even prior to the distribution of the trust property to him.

But respondents' argument to the contrary is unsound even on its own premise that no trust arises until the trustee acquires the trust property, for, under the Florida law, the devisee of real property becomes vested with the legal title thereto upon the death of the testator. The executor merely has the right to possession of the real estate during the period of administration. Redfearn on Wills and Administration of Estates in Florida, Section 153; Jones v. Federal Farm Mortgage Corp., 132 Fla. 807, 182 So. 226. Consequently, the respondents' argument that the Union Trust Company cannot maintain this suit because it did not have a vested interest in the trust property is without merit. Immediately upon Mrs. Porter's death and the probate of her will, the Union Trust Company became vested with the legal title to the Albemarle Hotels which were specifically devised to it as trustee under the will.

Finally, if there was the slightest merit to respondents'

argument that the Union Trust Company is merely a "prospective" trustee, the objection has certainly been waived by the failure to raise it in the Florida courts. The Supreme Court of Florida, in its opinion herein, and as a premise to its decision, twice refers to the right of the Union Trust Company to maintain this suit under the Florida statutes cited on page 17 of petitioner's brief in support of its petition for certiorari. (414, 423) The question must be considered as settled by that decision. It is certainly not a Federal question which may be raised in this Court for the first time.

II.

Respondents' contention, on page 3 of their brief, that the Union Trust Company is not "trustee of an express trust" within the meaning of the Florida statutes authorizing suits by such trustees is frivolous. There are but two kinds of trusts, express and implied. Implied trusts arise by operation of law. They are either resulting or constructive trusts. Express trusts are those arising from a declaration of intention to create a trust by the person owning the property made subject to the trust. A testamentary trust, such as that created by Mrs. Porter, is a common example of an express trust. 54 Am. Jur. 22, Section 5; Bogert on Trusts and Trustees, Volume 1, Sections 1 and 45; Scott on Trusts, Section 21. Furthermore, if there was any merit in this contention, it has been waived by the failure to raise the objection in the Florida courts.

III.

The respondents also contend that the constitutional right of the Theosophical Society cannot be raised or

enforced by the Union Trust Company as trustee. On page 5 of their brief they state that this right is "purely personal" and "cannot be vicariously enforced." Respondents cite no authority for their dogmatic statement.

But in Prince v. Massachusetts, 321 U. S. 158, 88 L. ed. 645, this Court permitted the legal custodian of a minor child to assert the child's right to religious liberty under the Federal Constitution.

Other analogous cases are Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, in which an alien was permitted to question the constitutionality of a statute requiring at least 80% of the employees of any person to be citizens of the United States; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, in which a white person who had agreed to sell land to a colored person was permitted to attack the constitutionality of an ordinance prohibiting the purchase of such land by a colored person; and Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, in which the owners of private schools were permitted to question the constitutionality of a statute requiring all children between the ages of eight and sixteen to attend the public schools.

It is true that, in each of the three cases last cited, the person raising the constitutional question had a property interest involved. But with that as a predicate, this Court in each case permitted one person to assert and enforce the constitutional rights of another. The principle of these cases is applicable to the case at bar. The Union Trust Company, as trustee, has a legal duty to protect the interest of the Theosophical Society in the Porter trust. For this purpose the trustee stands in the place of the bene-

ficiary. If the protection of the trust property requires the Union Trust Company to assert the constitutional right of the Theosophical Society to religious freedom, then the Union Trust Company is entitled to enforce that right. The decisions cited above establish that one person may assert the constitutional rights of another where that is the only practical way by which the right can be enforced.

The position of the Union Trust Company on this question may be illustrated by assuming, for the purpose of argument, that the Florida legislature had enacted a statute declaring illegal and void all bequests to religious organizations not of the Christian faith. Certainly, if such a statute had existed, the Union Trust Company could have attacked its constitutionality on behalf of and without the joinder of the Theosophical Society.

Furthermore, the right of the trustee to raise the constitutional question in a case such as that at bar may be absolutely necessary to afford to a beneficiary the religious liberty guarantied by the constitution. It is easy for the respondents to advance the theoretical argument that the right of religious liberty is so personal that it must be asserted by the beneficiary. But suppose the religious organization named as beneficiary is small and does not have the financial resources to finance extensive litigation? Does not the spirit of the constitutional guaranty permit the trustee to enforce the constitutional rights of such a beneficiary to the fullest extent necessary to protect its interest in the trust property? The question is its own answer.

The petitioner therefore submits that it may, as trustee, assert in this suit the right of the Theosophical Society

to religious freedom under the provisions of the Federal Constitution.

IV.

The real questions involved on this petition are whether the Supreme Court of Florida actually decided that the Theosophical Society was not a religious organization and, if it did, whether there is some other and non-Federal ground sufficient to support the judgment of the Supreme Court of Florida invalidating the Porter trust. These questions have been fully discussed in petitioner's brief in support of its petition for certiorari.

In answer to petitioner's brief on these questions the respondents contend, on pages 6 through 8 of their brief, that the Supreme Court of Florida did not pass upon the religious nature of the Theosophical Society but invalidated the Porter trust on the ground that "it sets up the corpus of the entire estate as a private memorial and provides that 50% of all income shall be used in perpetuity for the preservation of that memorial."

In support of their contention that the Supreme Court of Florida did not pass upon the religious nature of the Theosophical Society, the respondents make no attempt to explain how the Supreme Court of Florida could have held that the Porter trust violated the rule against perpetuities without also determining that the Theosophical Society was not a religious organization. The assertion that the trust is invalid because it created a memorial and because the accumulation provision was for the preservation of the memorial is merely an attempt to impart merit to two fallacious arguments by intermingling them.

Respondents' contention that the Supreme Court of Florida assumed, for the purposes of this case, that the trust beneficiaries were charitable is at variance with the plain language of the Court's opinion. The Court first held that the Porter trust was invalid because it violated the rule against perpetuities. It then said that a remaining question was the legal effect of the accumulation provision "and arguendo, conceding that the charity provision is public in character." (421) In the first place, if the trust was invalid because it violated the rule against perpetuities, then there was no remaining question. The trust was gone and anything said about the effect of the accumulation provision was surplusage. But, even in attempting to base its decision upon the alternative ground of the accumulation provision, the Court was careful to point out that it was treating the trust beneficiaries as charities only for the purpose of that alternative ground and not as a basis for the entire case. This must be true, for the Court had already conceded that, if the beneficiaries were charitable, the trust could not violate the rule against perpetuities. (421)

Respondents also adopt and emphasize the argument made by the Supreme Court of Florida that the provision for accumulating income is inseparable from the remainder of the trust. Neither the Supreme Court of Florida nor the respondents attempt to explain why the accumulation provision is inseparable from the remainder of the trust. The reason for this omission is quite clear. In Pelton v. First Trust & Savings Bank, 98 Fla. 748, 124 So. 169, the facts were identical with those in the case at bar. One half of the income was bequeathed to the Hillsborough County Humane Society in perpetuity and the other

half of the income was to be added to the trust corpus in perpetuity. The Court separated the accumulation provision from the remainder of the trust, held that the Hillsborough County Humane Society was entitled to one half of the trust income in perpetuity, that the provision for accumulating the second half of the trust income was invalid, that the decedent's widow, as his sole heir, was entitled to the second half of the trust income for her life, and that the disposition of the second half of the trust corpus was a matter for equitable adjudication after the death of the widow.

If the Supreme Court of Florida had applied the Pelton case to the instant case it would have been compelled to uphold the validity of at least half of the Porter trust. But the Court refused to apply the Pelton case to the instant case. Why was the accumulation provision separable from the remainder of the trust in the Pelton case and not in the instant case? The respondents offer no explanation. Can the respondents offer any explanation except the difference in the identity of the trust beneficiaries in the two cases?

The contention that the accumulation provision in the Porter trust is inseparable from the remainder of the trust and renders the entire trust invalid is also contradicted by the prior decision of the Supreme Court of Florida in Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328. In that case it was held that a direction to accumulate all of the trust income in perpetuity and loan it to worthy boys and girls to assist them in obtaining an education was valid and would be permitted to operate under the supervision of a court of equity so as to prevent the trust from becoming so large as to become a public menace. In the

case at bar, the Circuit Court of Pinellas County, Florida, held, in accordance with the Patillo case, that the provision for accumulation was valid and would be permitted to operate under the supervision of a court of equity. Why was the accumulation provision sustained in the Patillo case but held to invalidate the entire trust in the case at bar? Again, can the respondents offer any explanation for such action except the difference in the identity of the trust beneficiaries?

The most striking characteristic of the respondents' brief is its failure to even attempt to show that the asserted non-Federal grounds of the decision of the Supreme Court of Florida have any support either in the prior decisions of the Supreme Court of Florida or in the decisions from other states. This failure can only be construed as an admission that the so-called non-Federal grounds are without any fair or substantial support. The only remaining ground of the decision of the Supreme Court of Florida is, therefore, that the Theosophical Society and the other trust beneficiaries are not charitable organizations. This is a Federal question, reviewable by this Court.

CONCLUSION

In its recent decision in Everson v. Board of Education, decided February 10, 1947, this Court stated that "state power is no more to be used so as to handicap religions than it is to favor them." Certainly, any religious organization is handicapped by a judicial decision that it is not such a religious organization as will sustain a perpetual trust for its benefit. That is what the Supreme Court of Florida has decided with reference to the Theosophical Society in the case at bar. Petitioner submits that the decision of the Supreme Court of Florida on this question is reviewable by this Court.

FRANK M. HARRIS

HAROLD A. KOOMAN

Counsel for Petitioner